Supreme Court, U.S.
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No. 99-1899

IN THE

# Supreme Court of the United States

LOVIE L. WELLS, JR.,

*Petitioner,*

*v.*

LEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## BRIEF IN OPPOSITION

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## STATEMENT OF FACTS

To address misstatements of fact in the Petition, Lee County submits the following statement of facts:

The Lee County Division of Equal Opportunity (DEO) is an internal department of Lee County, Florida. Its existence is not required under Florida Law, Title VII, or any other federal law. Petitioner was employed as the Director of DEO. This division was charged with, among other things, enforcing employment discrimination claims by both county employees and non-employees, administering the Disadvantaged Business Enterprise (DBE) Program, which encouraged minority participation contract opportunities with Lee County and, investigating claims under the federal Fair Housing law. Plaintiff failed to prove that he opposed an employment practice made unlawful under Title VII.

The assertion in the Petition of a "continuing indirect but systematic attempt to force Mr. Wells to reduce, if not outright cease, the Title functions of his Division" is contrary to the facts in the record. Not only did Lee County increase DEO's budget and staff, Petitioner admitted his supervisors directed him to continue efforts on employment enforcement. Petitioner further admitted he was never directed to re-establish DEO's priorities so less time and effort would be spent on equal opportunity enforcement.

The record clearly establishes that there were several conflicts between Petitioner and Lee County. Petitioner's mismanagement of DEO, his failure to adhere to time deadlines, and refusal to follow his supervisors' direction to improve the office's failing morale were among them. However, the final area of conflict arose when Petitioner

resisted leading a new effort to recruit minorities for Lee County's workforce at the expense of deferring Fair Housing complaints to the federal agency. Petitioner's opposition to the deferral of Fair Housing complaints to an appropriate federal agency was open and discordant.

The only matter which Petitioner offered evidence at trial that he opposed Lee County on was the deferral of Fair Housing complaints. Petitioner never asserted that his job description alone constituted "opposition" under Title VII. Petitioner failed to prove that he was discharged in retaliation for participating in a Title VII proceeding. Moreover, Petitioner did not pursue a claim that his job description constituted protected activity under the Participation Clause and there is no evidence to establish a causal link between his job description and his discharge. The record establishes that the first mention by Petitioner that he was pursuing a theory that his job status was protected expression was in his post-trial brief in opposition to Lee County's Motion for Judgment Notwithstanding the Verdict.

## REASONS FOR DENYING THE WRIT

The relevant portion of Title VII, codified at § 42 U.S.C. 2000e-3(a) states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, of hearing under this subchapter.

## 1. Petitioner Failed to Prove a Case of Retaliatory Discharge

### A. Petitioner did not oppose an unlawful employment practice

An essential element in a retaliatory discharge claim under the opposition clause of Title VII is opposition to an unlawful employment practice. The record establishes that Petitioner opposed the deferral of Fair Housing complaints from Lee County to the appropriate federal agency. The subject Petitioner opposed, the deferral of fair housing complaints, is not an unlawful employment practice under Title VII. There is no evidence Petitioner was discharged because of his job description. Moreover, Lee County could have disbanded its DEO, as it is not required to have a DEO under Title VII or any other law. But, Lee County did not disband the DEO. It hired a new director of DEO after Petitioner was discharged to continue the DEO's functions. The problem was not with the job function, but with the individual employed to fulfill the job function.

### B. There is no evidence that Petitioner's discharge was causally related to his participation in any Title VII proceeding

Petitioner did not pursue a theory that his participation in employment discrimination proceedings was the basis for his discharge. There was no evidence presented at trial regarding such participation by Petitioner and Lee County's decision to discharge him. Nor was there any evidence to establish a causal link between any such participation and his discharge. Of course, Petitioner did not raise the theory that his job function alone constituted "participation" until

his response to Lee County's Motion for Judgment Notwithstanding the Verdict. Thus, having raised the issue for the first time after trial, the jury could not have considered and decided this issue.

## CONCLUSION

Petitioner presented no evidence that his participation in any Title VII proceeding was the basis for his discharge. Petitioner did not present a theory that his job function constituted "participation" in a Title VII proceeding until after trial. The posture of this case does not warrant the Count entertaining Petitioner's question.

Respectfully submitted,

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